

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Wireline Competition Bureau Seeks
Comment On Business Broadband
Marketplace

)
)
)
) WC Docket No. 10-188
)
)
)

REPLY COMMENTS OF AT&T INC.

David L. Lawson
James P. Young
Christopher T. Shenk
Sidley Austin LLP
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

Jack S. Zinman
Christopher M. Heimann
Gary L. Phillips
Paul K. Mancini
AT&T Inc.
1120 20th Street, N.W.
Washington, D.C. 20036
202-457-3053

Attorneys for AT&T

November 4, 2010

TABLE OF CONTENTS

INTRODUCTION & SUMMARY.....	1
I. THE COMMENTS ESTABLISH THAT THE MARKETPLACE FOR BROADBAND BUSINESS SERVICES IS THRIVING.....	9
A. The Comments Document The Widespread Competition Among Myriad Providers Of Broadband Business Services.....	9
B. The Comments Confirm Businesses Customers Are Reaping Substantial Benefits From The Intense Competition Among Broadband Providers.....	18
C. The Market Is Addressing Middle Mile Connectivity For Rural Areas, And Any Action To Further Facilitate Broadband Deployment In Those Areas Should Be Done With Technology Neutral Subsidies.	22
II. THE COMMISSION SHOULD REJECT THE SELF-SERVING PROPOSALS OF PROVIDERS SEEKING TO HAMPER COMPETITORS WITH INCREASED REGULATION.	25
CONCLUSION.....	47

**Before the
Federal Communications Commission
Washington, D.C. 20554**

)	
Wireline Competition Bureau Seeks)	WC Docket No. 10-188
Comment On Business Broadband)	
Marketplace)	
)	

REPLY COMMENTS OF AT&T INC.

AT&T Inc. (“AT&T”) respectfully submits these reply comments in response to the Commission’s September 15, 2010 Public *Notice*.¹

INTRODUCTION & SUMMARY

The comments document a business broadband marketplace that has largely achieved the fundamental goal of modern telecommunications policy: robust, self-sustaining, intensifying, *facilities-based* competition. Broadband providers of all types describe extensive facilities-based offerings and the intense competition that is driving investment, innovation, and enormous customer benefits, especially for small businesses. “Cable companies in particular, hav[ing] achieved a major (and at times dominant) position” in the provision of broadband business services,² confirm that they are “committed to meeting the broadband needs of small businesses.”³ These cable competitors already pass 83 percent of small businesses⁴ and already

¹ Public Notice, *Wireline Competition Bureau Seeks Comment On Business Broadband Marketplace*, WC Docket No. 10-188, DA 10-1743 (Sept. 15, 2010) (“*Notice*”).

² Comments of Qwest, at 6 (“Qwest”); *see also* Comments of Verizon, at 27-35 (“Verizon”); Comments of AT&T, at 14-16 (“AT&T”).

³ Comments of Time Warner Cable, at 2 (“TWC”).

⁴ *Cable Operators & Ethernet: Serious Business*, Light Reading Insider, Targeted Analysis of the Telecom Industry, at 3 (Jan. 2010) (“Light Reading’s Cable Report”).

offer a full range of services from cable modem to optical and Ethernet services,⁵ and they are “invest[ing] tens of billions of dollars” in pursuit of an even bigger slice of the business services pie.⁶ Any such gains will be hard won. As the comments likewise confirm, national, regional and local facilities-based LECs and fixed and mobile wireless providers offer their own broad arrays of broadband services for every business size and type and all are actively and successfully responding to the enormous opportunities represented by business broadband.⁷

Competition, of course, is not an end in itself, but a means of providing benefits to customers. Thus, the substantial evidence in the record demonstrating that small and large businesses are realizing unprecedented benefits from today’s intense broadband competition merits particular emphasis. DSL services are much faster and cost less.⁸ Cable companies have “dramatically increased the speed of” their “broadband Internet offerings,” “without corresponding price increases.”⁹ Fixed wireless services are now widely available, offer a broad range of speeds, support Ethernet, and can beat wireline installation costs, and next-generation

⁵ See, e.g., Comments of Comcast, at 1-2 (“Comcast”); TWC, at 3-8.

⁶ See, e.g., Comments of Charter, at 1 (“Charter”); Comcast, at 1-2.

⁷ See Comments of Cbeyond, Integra, MegaPath, Covad, and tw telecom, at 4-16 (“Joint CLECs”); Comments of the California Association of Competitive Telecommunications Companies, at 4-28 (“CALTEL”); Comments of Earthlink and New Edge Networks, at 1-8 (“Earthlink/New Edge”); Comments of Paetec, at 1-8 (“Paetec”); Comments of XO, at 1-5 (“XO”); Comments of The Blooston Rural Carriers, at 1-6 (“Blooston”); Comments of NECA, at 1-9 (“NECA”); AT&T, at 10-33; Verizon, at 11-15 & App. A; Qwest at 4-6.

⁸ See, e.g., CALTEL, at 24 (Sonic.net states that it has now deployed “uncapped ADSL that runs as fast as . . . 20 Mbps.”); AT&T, at 20-21 (“AT&T is making hundreds of millions of dollars of investments to upgrade its legacy DSL facilities to offer even faster and even more reliable broadband connections”); *id.* at 20 (AT&T reduced DSL prices by 45 percent and other managed Internet services by 50 percent or more).

⁹ Comcast, at 4; TWC, at 2.

mobile wireless offerings are being rolled out with speeds that rival those of many wireline services.¹⁰

All commenters likewise recognize the rapid shift away from legacy TDM transmission services toward managed, feature-rich, value-added Ethernet and IP-based services, which “provide significantly more bandwidth at substantially lower cost,” offer small businesses increased “flexib[ility] and scalab[ility],” and expand opportunities for smaller, newer and niche providers to satisfy customers’ widely varying needs.¹¹ Today’s business customers are awash in competing offers that deliver an ever wider variety of benefits, from customizable turnkey and bundled solutions to cloud-based features and real-time service monitoring and fine-tuning to financing and professional services. This, of course, provides even more fuel to the competitive fire, as evidenced by the wide-open Ethernet space, where CLECs are already market leaders and continue to gain share rapidly.

Thus, so long as the Commission’s focus remains, at it should, on business *customers* and whether *they* are realizing the benefits of competition, there is no conceivable basis for regulatory intervention in a market that is working extremely well. The Commission’s pro-investment policies that reduced monopoly-era forced infrastructure sharing and direct rate regulation have produced what everyone hoped for: true facilities-based competition that has spurred the supply of and demand for better, faster and cheaper broadband services.¹² As the

¹⁰ See, e.g., Verizon, at 28-29 & App. B (citing public documents and analyst reports of more than a dozen wireless providers); Paetec, at 4; XO, <http://www.xo.com/services/network/Pages/broadband-wireless.aspx> (documenting XO’s fixed wireless offerings).

¹¹ See, e.g., Joint CLECs, at 7, 14; CALTEL, at 10,18; Paetec, at 4 (describing Paetec’s Ethernet offerings); TWC, at 6; Comcast, at 3; XO, at 4.

¹² See, e.g., TWC, at 10-11 (“the Commission’s commitment to pro-investment policies in the past has encouraged TWC to develop its broadband network and provide [its] innovative and diverse [business broadband] offerings”).

Commission recognized in its National Broadband Plan, the real challenge in business broadband throughout most of the country is not in finding ways to spur availability or adoption, but in finding ways to assist customers in navigating the plethora of broadband options available to them.¹³

To be sure, there remain trouble spots in some rural areas, where companies have to construct longer connections that will serve relatively few customers, but here, too, there has been real progress. As the comments illustrate, technology advances, entrepreneurial efforts, and targeted subsidies have generated a whirlwind of new rural investment and business broadband opportunities.¹⁴ There are an increasing number of statewide fiber rings that serve a consortium of carriers, and newer wireless technologies are particularly cost-effective in rural areas – which means that microwave providers and others using both dedicated spectrum and “white spaces” are now, or will soon be, providing affordable competitive alternatives to businesses in many areas. To the extent that these efforts fall short and legitimate concerns that facilities-based competition may be economically infeasible in some rural areas remain, policymakers should respond with additional, targeted competitively and technologically neutral subsidy programs.

In short, business broadband is a buyer’s market, which may explain why the naysayers seeking Commission intervention in a working marketplace come almost exclusively from a familiar subset of competitors. Their complaint is not that *customers* are not realizing the benefits of competition. To the contrary, the CLECs agree that there is vibrant retail competition today (and, indeed, lament the “commoditiz[ation]” of service pricing that competition has spawned).¹⁵ Nor is their complaint that they lack wholesale alternatives – they freely concede

¹³ National Broadband Plan, at 266-268.

¹⁴ See, e.g., Blooston, at 10.

¹⁵ See, e.g., Paetec, at 7.

that they have a wealth of wholesale options from ILECs, and that they also can and do buy wholesale inputs from cable companies, other CLECs, and fiber and wireless providers. Indeed, many of these CLECs choose to rely almost *entirely* on below-cost DS1 and DS3 UNEs, which remain available in the vast majority of wire centers despite extensive facilities-based competition that eliminates any justification for that regulation.

Rather, the CLECs' complaint is solely that they would love to pay even less for their wholesale inputs, and indeed, that they would like one particular group of wholesale suppliers, their ILEC competitors, to be forced to create and maintain entirely *new*, below-cost wholesale inputs. As is often the case when the Commission is asked to use regulation not to protect competition or consumers, but to promote the business interests of individual *competitors*, the "ask" is as varied as the preferred business plans of the clamoring supplicants, with conflicting positions even among members of a single CLEC commenter group. Thus, CLECs who want the Commission to create new regulated ILEC *fiber* service offerings claim that copper facilities are all but worthless in the Ethernet world, while their compatriots that are actually providing Ethernet over copper contend that the Commission's number one priority must be erecting onerous new regulatory barriers to ILEC retirement of copper facilities that have been replaced by fiber. All in, the CLECs ask the Commission to create a forced sharing Hydra with more investment-freezing heads than existed even at the zenith of the unbundling era.

But those extreme forms of regulation, which, at most, can create "synthetic" competition,¹⁶ are meant to be a last resort – they are properly reserved for situations in which there is a facilities-based natural monopoly and potential competitors are thus truly "impaired" without forced sharing at regulated prices. In reality, retail business broadband competition is

¹⁶ *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002) ("*USTA I*").

flourishing without the many new regulatory crutches the CLECs seek: as the CLECs admit, they are leading broadband providers that have successfully won the business of *hundreds of thousands* of business customers,¹⁷ using their own facilities or the wide variety of wholesale broadband inputs supplied by the market and existing regulation.¹⁸ Where, as here, competitors of all types are already competing successfully, arbitrarily singling out one group of competitors for expanded forced sharing requirements would impose costs (and deadweight losses) and distort market outcomes with *no* corresponding consumer benefits.

Forced sharing, rate regulation and the business uncertainty they create reduce incentives to invest in the facilities and technologies that business customers are increasingly demanding. They unquestionably dampen the investment incentives of those that are forced to share their infrastructure at bargain basement rates. And it is equally clear that such regimes seduce potential competitors into foregoing investment in their own facilities – as the experience of the complaining CLECs vividly illustrates. Forced sharing regimes also impose extraordinary administrative costs – indeed, the CLECs seem to forget that regulatory management and oversight of prior unbundling regimes consumed enormous resources of both the Commission and the entire industry and swamped the courts and state commissions with endless litigation. And Chicken Little claims that competition will collapse without more regulation have been disproved several times over: the Commission eliminated many sharing requirements in the past decade, and the result has been an explosion of facilities-based competition and unprecedented consumer benefits – not a diminution of competition. It is quite remarkable that those who have

¹⁷ See, e.g., Joint CLECs, at 5, 7, 11,13 (Cbeyond has “more than 53,000 small business customers;” Integra has “more than 100,000 business and carrier customers;” Megapath has “more than 85,000 business” customers; “tw telecom “has the third highest market share of retail Ethernet ports in service”); XO, at 1 (XO serves more than “90,000 customers”); CALTEL, at 4-28.

¹⁸ See, e.g., Joint CLECs, at 22-23; Earthlink/New Edge, at 4; CALTEL, at 4-28.

cried wolf so many times, predicting disastrous consequences each time the Commission has scaled back unbundling regulation in response to facilities-based competition, continue unabashed to advocate more and more unbundling regulation.

In this context, where facilities-based competition is robust and CLECs are competing successfully, it is also worth remembering that singling out ILECs for expanded forced sharing rules would never withstand judicial review. The D.C. Circuit struck down the Commission's previous "line sharing" rules, precisely because of the Commission's "naked disregard of the competitive context" in the broadband marketplace, particularly the existence of "robust competition" and the "dominance of cable."¹⁹ As the court explained in upholding the Commission's subsequent decision not to require unbundling of ILEC broadband facilities, "[a]n unbundling requirement . . . seems likely to delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy [broadband facilities] and ILECs fearful that CLEC access would undermine the investments' potential return," whereas the "[a]bsence of unbundling, by contrast, will give all the parties an incentive to take a shot at this potentially lucrative market."²⁰ Courts have consistently held that the Communications Act is designed to protect competition, not individual competitors, but here mandated sharing and price breaks would merely give unwarranted help to one set of competitors at the expense of another.²¹ Indeed, the Commission

¹⁹ *USTA I*, 290 F.3d at 428-29 (unlawful for Commission to "inflict on the economy the sort of costs" associated with mandated unbundling with "naked disregard of the competitive context"); see also *Time Warner Entertainment Co. L.P. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001); *Comcast Corp. v. FCC*, 579 F.3d 1, 6-7 (D.C. Cir. 2009).

²⁰ *United States Telecom Assoc. v. FCC*, 359 F.3d 554, 580 (D.C. Cir. 2004) ("*USTA II*").

²¹ *Applications of Craig O. McCaw, Transferor, and American Tel. & Telegraph Co., Transferee*, 10 FCC Rcd. 11786, ¶ 9 (1995); *SBC v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) ("[t]he Commission is not at liberty . . . to subordinate the public interest to the interest of equalizing competition among competitors") (internal quotations omitted); *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974); *United States v. Western Elec. Co.*, 969 F.2d 1231, 1243 (D.C. Cir. 1992) (to the extent that parties contend that communications laws "should be

has already expressly found, and the D.C. Circuit affirmed, that CLECs are *not* impaired in their ability to offer the services for which they now seek a leg up.²²

And where is the support for the CLECs' proposed regulatory free-for-all? With much fanfare, prior to filing their comments, the CLECs asked the Commission for a stringent protective order that would allow them to submit "granular" and "detailed" data supposedly showing a lack of competition. The actual comments, however, contain *no* such data – only the same unsupported assertions the CLECs have been making for years that they are entirely dependent upon ILEC facilities. For example, CLECs claim to "show" a lack of competition by asserting that they often purchase incumbent LEC wholesale offerings, particularly UNEs. But that says nothing about the *availability* of other economically viable options. The TELRIC methodology that is used to determine the price of UNEs is extremely unrealistic and produces below-cost rates – and thus it should not be surprising that CLECs prefer UNEs to building their own facilities or buying at wholesale from cable or other providers at market rates. And, in all events, since the CLECs are already competing successfully under the *current* UNE regime, their bald assertions, even if they could be credited, would provide no basis for ordering *more* unbundling.

Unfortunately, the never-ending stream of baseless and self-serving requests for new regulation from those that want to piggyback off the investments of their competitors keeps a cloud of regulatory uncertainty over the entire industry. The Commission should dispel that

interpreted to aid the minnows against the trout, such as AT&T and MCI (effectively devaluing the investments those companies have made in extending their CCS networks to more LATAs), they are simply wrong").

²² See Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket Nos. 04-313, 01-338, FCC 04-290, ¶ 5 (Feb. 4, 2005) ("TRO"), *aff'd*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

uncertainty, and recognize that business customers are currently enjoying the fruits of sound policy decisions that have produced robust *facilities-based* competition.

I. THE COMMENTS ESTABLISH THAT THE MARKETPLACE FOR BROADBAND BUSINESS SERVICES IS THRIVING.

The *Notice* sought marketplace evidence on whether “*businesses* [are] realiz[ing] the maximum benefits of broadband services and competition.”²³ The comments leave no doubt that facilities-based competition has taken hold throughout the broadband business marketplace and that businesses are reaping enormous benefits as a result. Cable companies, CLECs, ILECs, and others all document the vast array of facilities-based broadband service offerings they provide to business customers of all sizes, the substantial service quality improvements, innovations, and entrepreneurial opportunities this competition is delivering to business broadband users, and the types of investments existing and new providers are making in their networks and technology to provide even better services. This facilities-based competition is now self-sustaining and is only getting stronger, as the comments demonstrate: cable companies and wireless providers continue to invest to expand their networks, and more and more customers are migrating to Ethernet-based services where no provider has any historical advantage.

A. The Comments Document The Widespread Competition Among Myriad Providers Of Broadband Business Services.

Broadband providers of all types submitted comments describing the wide array of facilities-based broadband services they offer, and it is clear that (1) cable companies, (2) CLECs, (3) wireless providers, (4) large ILECs, and (5) rural LECs all provide a broad range of facilities-based broadband services to businesses. These commenters document that they provide

²³ *Notice* at 2 (emphasis added).

numerous facilities-based options to business of all sizes, including a vast array of options for *small* businesses, in today's robustly competitive environment.

The growth of the cable companies' broadband business offerings is particularly striking. Cable companies explained that the "business broadband marketplace represents a dynamic and innovative environment for competitive, broadband-based services".²⁴ They "provide[] high-capacity transmission services, such as Metro Ethernet, to a growing cadre of businesses, in competition with the former Bell Operating Companies and other services providers."²⁵ They describe themselves as "leading provider[s] of broadband Internet access . . . to . . . commercial customers," stress that the "provision of broadband-based services to businesses is a core aspect" of their "corporate strategy," and note that they are particularly "committed to meeting the broadband needs of small businesses."²⁶ They are "invest[ing] tens of billions of dollars . . . to

²⁴ Charter, at 10; TWC, at 10 (The Commission "should ensure that none of its related policy initiatives undermines the increasingly vibrant business broadband marketplace"); *id.* ("TWC has steadily enhanced and adapted its facilities . . . helping to drive considerable competition in the broadband arena").

²⁵ TWC, at 2; *see also* Comcast, at 1-2 (explaining that it competes for "small businesses" "medium-sized businesses" and "enterprise customers" in competition with "other competing providers" using its "nationwide broadband Internet Protocol (IP) network in which it has invested tens of billions of dollars . . . to constantly upgrade and develop and deploy new technology to deliver an array of services"); Cox Website, <http://ww2.cox.com/business/northernvirginia/data/business-internet.cox> (showing that Cox offers a wide variety of broadband services, including Business Internet (cable modem), Optical Internet, Metro Ethernet, Private line, and VPN services. Cox's cable modem-based business Internet service includes speeds of up to 15 Mbps, backup solutions, email, web hosting and other services); Cablevision Website, http://www.optimumlightpath.com/ourservices_data.shtml (showing that Cablevision offers business class cable modem services from 15 Mbps to 100 Mbps and Metro Ethernet solutions from 10 Mbps to 1 Gbps over its fiber network for dedicated Internet, as well as point-to-point, point-to-multipoint, and multipoint-to-multipoint services).

²⁶ TWC, at 2; *see also, e.g., id.* ("Today, TWC offers a wide range of competitive, cutting edge services to small, medium-sized, and enterprise-level customers, and has several thousand employees dedicated exclusively to supporting this important and growing component of TWC's customer base"); Comcast at 2 ("Even in the current economic downturn, Comcast continues to devote substantial resources to improving its business class offerings"); Charter at 1 (explaining that Charter focuses on "small and medium businesses" and that it has "considerable and unique

constantly upgrade and develop and deploy new technologies to deliver an array of services [to] business customers,”²⁷ and one of them reports having more fiber coverage in its footprint than even the competing ILEC.²⁸ They already pass 83 percent of small firms and 57 percent of medium sized firms,²⁹ and they offer the full complement of TDM and Ethernet services³⁰ along with value-added services that give small businesses “cost-effective access to the same communications tools used by many of the worlds’ largest corporations.”³¹ As Qwest sums it up, “[c]able companies . . . have achieved a major (and sometimes dominant) position” in the business broadband marketplace.³²

CLECs, which have been offering facilities-based broadband services for nearly two decades, also have extensive facilities-based offerings. They tout that they “are providing innovative services, many of which are IP-based, to business customers of all sizes across a multitude of industries.”³³ They describe themselves as the “nation’s largest providers of

insight into opportunities to expand the availability of competitive service in the business broadband market”).

²⁷ Comcast, at 1-2; *see also, e.g.*, Charter, at 1 (“Charter has invested over \$8 billion to deploy broadband, competitive voice and advanced video services”); AT&T, at 14-16 (documenting the billions of dollars of investment by Time Warner, Comcast, Charter, Cablevision, and Cox); Verizon, at 27-35 (same).

²⁸ *Ex Parte* Letter from Glenn T. Reynolds (USTelecom) to Marlene H. Dortch (FCC), WC Docket No. 05-25, at 36 (July 16, 2009). (Cablevision has “more fiber in the [New York/New Jersey/Connecticut] tri-state area than any phone company,” and which provides fiber service to twice as many buildings in its metropolitan New York footprint as Verizon does.”)

²⁹ Light Reading’s Cable Report, at 3.

³⁰ Comcast, at 1-2; TWC, at 3-8.

³¹ Comcast, at 5; TWC, at 8-10; Charter, at 1-2.

³² Qwest, at 6; *see also* Verizon, at 27-35 & App. B (printouts of websites documenting business offerings of Cablevision, Charter, Comcast, Cox, Time Warner Cable, and RCN); AT&T, at 14-16.

³³ Joint CLECs, at 4; *See also, e.g., id.* at 2 (“Competitors like Cbeyond, Integra and MegaPath have excelled at delivering innovative services and applications to small and medium-sized

innovative broadband and other competitive services,” and they emphasize that they are “leading alternative broadband providers for small and medium businesses as well as larger enterprises.”³⁴ Some CLECs are now major communications corporations – such as tw telecom, with “the third-highest [U.S.] market share of retail Ethernet ports in service and one of the ten most interconnected IP backbones in the world,”³⁵ and Level 3, with “one of the largest IP transit networks in North America and Europe”³⁶ – and there are numerous other national, regional, and local providers.³⁷ CLECs have deployed tens of thousands of miles of fiber facilities throughout

businesses”); *id.* at 3 (“tw telecom has driven innovation in the provision of Ethernet services to medium-sized and large business customers”); XO, at 1 (“XO . . . [provides] innovative broadband and other . . . services . . . [to] small and medium businesses as well as larger enterprises.”); CALTEL, at 1 (Small and medium businesses, including very small businesses, are “the lifeblood of CLECs in California”); Verizon attaches to its comments printouts of the business broadband services offered by more than a dozen CLECs as shown on their websites. Verizon, App. B; *see also* AT&T, at 16-17.

³⁴ XO, at 1; *see also, e.g.*, CALTEL, at 5 (“TelePacific Communications is the third largest telecommunications provider in California (behind AT&T and Verizon), and the second largest provider of products and services to business customers”). Joint CLECs, at 4-5 (“[B]usinesses of all sizes increasingly seek to utilize competitors’ services to (1) simplify their networks and combine voice, data, video, and Internet traffic over a single connection; (2) choose Quality of Service parameters to prioritize key traffic and applications; (3) connect multiple offices, branches, or stores over a private network provided by a single service provider; (4) support high-bandwidth applications at lower cost; (5) transport and store critical business data reliably and securely; and (6) scale bandwidth as their businesses grow.”).

³⁵ Joint CLECs, at 13.

³⁶ Level 3 Website, <http://www.level3.com/index.cfm?pageID=242>.

³⁷ *See, e.g.*, Joint CLECs, at 5 (Cbeyond “delivers integrated packages of voice, mobile, and broadband services to . . . small businesses in 14 markets nationwide”); *id.* at 7 (Integra “provides integrated communications to . . . businesses and carrier customers across 33 metropolitan areas in 11 Western states.”); *id.* at 11 (“MegaPath operates one of the largest end-to-end communications network in the country”); XO, at 1 (“XO has . . . facilities serving 75 local markets across the United States”); CALTEL, at 5 (“TelePacific Communications is the third largest telecommunication provider in California”); *id.* at 5-30 (describing the broad array of services offered by several California CLECs).

the country,³⁸ they have large holdings of microwave wireless spectrum,³⁹ and they offer a full range of business broadband and value added services using all of these facilities,⁴⁰ as well as wholesale services obtained from other CLECs, cable companies, wireless providers and ILECs.⁴¹

CLECs have been “enormously successful” in winning customers,⁴² and in some areas they lead even large ILECs in terms of businesses they serve.⁴³ In fact, CLECs have certain

³⁸ XO, at 1; *see also, e.g.* Joint CLECs, at 7, 13 (“Integra owns and operates a 2,800 route mile metropolitan area network and a 4,900 mile high-speed long-haul fiber network”; “tw telecom connects more commercial buildings to its fiber network throughout the country than any other competitive communications provider”); CALTEL, at 5-30 (describing the substantial fiber networks of sample California CLECs).

³⁹ *See, e.g.,* XO Website, <http://www.xo.com/services/network/Pages/broadband-wireless.aspx>. (XO operates “the nation’s largest holder of Local Multipoint Distribution System (LMDS) spectrum with licenses in 80 metropolitan markets across the United States, XO Communications uses this wireless technology to extend the reach of the XO 19,000-mile nationwide fiber network.”); Paetec, *Fixed Wireless: In Brief*, http://www.paetec.com/downloads/app_brief/Fixed_Wireless_AppBrief.pdf (“PAETEC’s Fixed Wireless offers you an alternative last-mile and metro-area solution to complement or replace your existing physical infrastructure”).

⁴⁰ XO, at 1 (XO provides “state-of-the-art business and carrier services”); Joint CLECs, at 7 (“In addition to standalone local voice, long distance, voice and Internet access services, Integra offers a host of integrated voice and data services and applications delivered over a full range of access methods, including DSL, Broadband, (Bonded DSL), T1s, Ethernet-over-copper, and Ethernet over fiber” and “[t]hese services include Trunking, business Lines, and SIP Trunking”); Joint CLECs at 11-12 (describing extensive MegaPath and Covad offerings); *id.* at 13 (“tw telecom provides managed network services, specializing in converged services, Ethernet and transport data networking, Internet access, local and long distance voice, VoIP, VPN, and security” to businesses of all sizes “throughout the U.S. and globally”); CALTEL at 5-30 (describing the wide range of offerings by California CLECs).

⁴¹ *See, e.g.,* Joint CLECs at 22-23 (Integra uses cable wholesale inputs); Earthlink/New Edge at 4 (New Edge’s services utilize a blend of available access technologies including DSL, T1 lines, fiber optic and wireless broadband connections”); Paetec at 4-5 (explaining that it offers fiber, copper and wireless-based services).

⁴² XO, at 1 (XO serves more than “90,000 customers”); Joint CLECs, at 5, 7, 11, 13 (Cbeyond has “more than 53,000 small business customers;” Integra has “more than 100,000 business and carrier customers;” Megapath has “more than 85,000 business” customers; “tw telecom “has the third highest market share of retail Ethernet ports in service”); CALTEL, at 5-30.

competitive advantages in some circumstances – for example, “[m]ultisite [small business customers] are more likely to choose a [CLEC] for complete data-centric services.”⁴⁴ And, of course, CLECs are a major force in the surge toward Ethernet services: many CLECs are industry leaders in next-generation deployment of Ethernet services.⁴⁵ tw telecom, for example very recently announced that that it “continues to see the benefits of the ongoing adoption of enterprise and Internet services, particularly Ethernet,” with “Ethernet and managed VPN gr[owing by] 28 percent year over year.”⁴⁶ As one industry analyst recently remarked: “Continuing a trend that was identified from previous share results, Competitive Providers and Cable MSOs once again gained port share from Incumbents. This trend is attributed primarily to a broadening of market competition.”⁴⁷

⁴³ See, e.g., CALTEL, at 5 (“Telepacific Communications is the third largest telecommunications provider in California . . . and [the] second largest provider of products and services to business customers.”).

⁴⁴ CALTEL, Attachment, Deloitte, A Window of Opportunity, at 6 (2006); see also, e.g., Joint CLECs, at 15 (tw telecom explaining that it is “leader” in connecting businesses with multiple locations, and providing as an example a “31-site voice and Ethernet network for a regional bank” that it serves); Earthlink/New Edge, at 8 (describing New Edges capabilities to network multilocation businesses, including “an outpatient rehabilitation facilities that has services in over 600 locations).

⁴⁵ See XO, at 3-5 (describing XO’s extensive use of Ethernet over Copper); Joint CLECs at 13 (tw telecom “has the third-highest market share of retail Ethernet ports in service and one of the ten most interconnected IP backbones in the world”); *id.* at 7-8, 12 (describing the extensive Ethernet offerings of Integra and MegaPath); CALTEL, at 10-11, 18 (discussing the extensive Ethernet services offered by TelePacific and Creative Interconnect); Paetec, at 4 (describing Paetec’s extensive Ethernet offering).

⁴⁶ Sean Buckley, *tw telecom’s Ethernet, Data Network Bets Pay Off In Q3*, Fierce Telecom (Nov. 4, 2010), available at http://www.fiercetelecom.com/story/tw-telecoms-nasdaq-twtc-ethernet-data-networking-bets-pay-q3/2010-11-04?utm_medium=nl&utm_source=internal. See also *id.* (“‘We continue to see momentum in our business as we strategically position ourselves for growth,’ said Larissa Herda, tw telecom’s Chairman, CEO and President in an earnings release. ‘We’ve demonstrated ongoing leadership with Ethernet and IP services, and we’re further leveraging these areas through new product enhancements.’”).

⁴⁷ Vertical Systems Group, Mid-Year 2010 U.S. Port Share (August 2010).

Microwave wireless providers also compete intensely throughout the country for broadband business customers. “[T]oday, numerous fixed wireless providers – including Paetec, Airband, Towerstream, Nextlink (XO), Clearwire, Covad Wireless, Business Only Broadband, and Tower Cloud – now offer fixed wireless services in areas throughout the country.”⁴⁸ Microwave wireless providers offer broadband speeds “ranging from DS-1 to Gigabit Ethernet to OCn, both to business customers and in some cases wholesale customers,”⁴⁹ with service level agreements that rival those of wireline services.⁵⁰ Indeed, wireless providers today account for a significant portion of ILEC wireline business line losses.⁵¹ And competition from mobile

⁴⁸ Verizon, at 28-29 & App. B (citing wireless provider public documents and analyst reports for more than a dozen wireless providers); *see also*, e.g., AT&T, at 17-19 (citing wireless provider public documents and analyst reports); Paetec at 4 (explaining that Paetec offers “Fixed Wireless . . . service [as] an alternative last-mile and metro-area data and voice transport solution that can complement or replace a portion of a customer’s existing physical network infrastructure. Fixed Wireless can be either a standalone point-to-point solution, or bundled with other Paetec services as part of a business continuity solution to maximize a network’s operational efficiencies by sharing its communications load across multiple transport paths”); XO, <http://www.xo.com/services/network/Pages/broadband-wireless.aspx> (“XO is “the nation’s largest holder of Local Multipoint Distribution System (LMDS) spectrum with licenses in 80 metropolitan markets across the United States” that it “uses” to offer business services together with its “19,000-mile nationwide fiber network”); Covad Wireless, *T1-Class Business Internet Service Throughout California, in Las Vegas and the Chicago Area*, <http://www.covadwireless.com/network-coverage.html> (Covad Wireless “offers service in over 220 sites”); Towerstream, *About Towerstream*, <http://www.towerstream.com/indx.asp?ref=company> (TowerStream offers service in 11 markets); Airband Communications Press Release, *Airband’s Agent Channel Sales Double, fueling Company Growth* (Sep. 20, 2010), <http://airband.com/press-releases/airband%E2%80%99s-agent-channel-sales-double-fueling-company-growth> (Airband states that it a full suite of broadband business services in 17 markets).

⁴⁹ Verizon at 28 (citing wireless provider public documents); *see also* AT&T at 17-19 (citing wireless provider public documents and analyst reports).

⁵⁰ *See*, e.g., FiberTower Corp. *et al.*, Petition for Reconsideration, *Unlicensed Operation in the TV Broadcast Bands; Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, ET Docket Nos. 04-186 & 02-380, at 2, n.3 (March 19, 2009) (describing service level agreements for services using licensed spectrum); Towerstream, *Service Level Agreement*, <http://www.towerstream.com/index.asp?ref=sla>.

⁵¹ *See*, e.g., AT&T, at 18-19.

wireless providers is increasing. For example, AT&T, Verizon, Sprint, T-Mobile, MetroPCS, Leap, U.S. Cellular, and Cox are all investing billions of dollars in next-generation networks and technologies, including HSPA+, LTE, WiMAX, and satellite, that rival today's wireline and microwave speeds.⁵² And mobile wireless broadband providers already offer their services as a substitute for many wireline connections.⁵³

ILECs, such as AT&T, Verizon and Qwest, also offer an extremely broad array of broadband services to businesses of all sizes.⁵⁴ In addition to their comprehensive enterprise-level service offerings, all of these ILECs offer numerous services targeted specifically to small and medium sized business.⁵⁵ AT&T, for example, offers nationwide business-class DSL services for smaller businesses, and dedicated managed Internet services for medium sized and large businesses, all of which include first in class service quality commitments, and can be purchased alone, or in a variety of bundles that offer a wide range of additional services (*e.g.*, telephone, mobile phone, video, web-hosting, email, data backup, technical support, consulting, and more). As discussed in AT&T's opening comments, AT&T continues to develop new innovative services, such as its "Business In A Box" service that provides a single line and a

⁵² See, *e.g.*, Verizon, at 30-35; AT&T, at 19.

⁵³ Clearwire, for example, targets small businesses with its "Clear Professional" service that provides a wireless broadband Internet access connection to a small business's premise together with a mobile plan that permits the small business's end users to obtain "broadband Internet access connectivity from remote locations using a laptop computer and a wireless card or USB dongle provided by Clearwire." Clearwire Website, <http://www.clear.com/shop/professional/on-the-go>.

⁵⁴ See, *e.g.*, AT&T, at 11, 19-28. (describing some of AT&T's many business offerings) Verizon, at 11-15 (describing Verizon's business offerings); Qwest, at 3 & Appendices A, B (documenting Qwest's numerous small, medium and large business offerings).

⁵⁵ Verizon, at 2 ("Verizon offers a wide range of broadband services over both wireline and wireless networks to business customers ranging from solo offices to multi-national enterprises and everything in between"); Qwest, at 3 & Appendices A, B (documenting Qwest's small business offerings); AT&T, at 19.

single piece of customer premises equipment capable of providing virtually all of the business services (including broadband and telephone) that a small and growing business may need. AT&T also devotes substantial resources – including access to engineers and business consultants – to directly assist entrepreneurs seeking to develop the next generation of applications and devices.

Rural LECs (“RLECs”) likewise confirm that they are making enormous investments and taking innovative approaches to bring broadband business services to the areas they serve. NECA, for example, reports that its members “are already providing a variety of broadband services to help keep local businesses and rural economies vibrant” and that these LECs offer broadband business services “using various network technologies including copper wire, coax, fiber, and fixed wireless.”⁵⁶ “These services include DSL (of varying speeds), . . . [and] high-capacity services such as DSL and DS3, SONET OC3 and OC12 services, Frame Relay, ATM and Ethernet.”⁵⁷ Their customers “rang[e] from small retailers and home-based businesses to large wholesale customers such as wireless carriers and Internet Service providers.”⁵⁸ RLECs “are seeking to meet these needs by investing in scalable and efficient networks that enable the speeds necessary for today’s and tomorrow’s applications and data requirements.”⁵⁹

⁵⁶ NECA, at 2. *See also* Blooston, at 1 (“The Blooston Rural Carriers are presently providing broadband services to farms, ranches, grain elevators, mines, logging companies, distribution centers, stores, industrial parks, windmill farms and a variety of other manufacturing and service businesses located in their service areas”).

⁵⁷ NECA, at 2-3; *see also* Blooston, at 4 (“The RLECs deploy fiber and other high-speed broadband facilities and services to [rural] businesses and industrial parks.”).

⁵⁸ NECA, at 3.

⁵⁹ *Id.* at 9.

B. The Comments Confirm Businesses Customers Are Reaping Substantial Benefits From The Intense Competition Among Broadband Providers.

The inevitable result of all of this facilities-based (and non-facilities-based) competition is significant benefits for consumers. Today, small businesses have access to many of the “same communications tools used by many of the world’s largest corporations,”⁶⁰ and they are receiving faster, more reliable, and more secure services at prices that are the same or lower than what they used to pay. Indeed, Paetec laments (at 7) that “Internet connectivity and MPLS WAN services have become highly commoditized.”

First, business customers of all sizes are enjoying substantial benefits from intense competition among numerous providers of Ethernet services. Small- and medium-sized businesses can obtain Ethernet services from cable companies,⁶¹ wireless providers,⁶² CLECs⁶³

⁶⁰ See, e.g., Comcast, at 5 (discussing “hosted” solutions that now provide business customers with “the same communications tools used by many of the world’s largest corporations.”).

⁶¹ See, e.g., Comcast, at 3 (Comcast has “introduced Metro-Ethernet services”); TWC, at 6-7 (“TWC’s Metro Ethernet offering . . . is a dedicated data networking services provided using hybrid fiber-coaxial and fiber optic technology”).

⁶² See, e.g., Verizon, at 28 & App. B (documenting the many wireless providers offering Ethernet services); AT&T, at 10-23 (documenting wireless providers use of Ethernet). For example, XO explains that “[u]sing Broadband Wireless Access for XO VoIP, Ethernet Solutions, MPLS IP-VPN, Private Line and DIA services, businesses in many metro areas across the country and organizations with campus environments can get easy-to-install, high-speed connections that also help meet requirements for physically redundant facilities.” XO, <http://www.xo.com/services/network/Pages/broadband-wireless.aspx>.

⁶³ See, e.g., XO, at 4 (“XO and numerous other competitive LECs” provide “metro and wide area Ethernet networks to business[es]”); Joint CLECs, at 2 (“tw telecom has driven innovation in the provision of Ethernet services to medium-sized and large business customers”); *id.* at 8 (Integra “offers a diverse selection of bandwidth options, from T1 to GigEthernet, to provide businesses with the flexibility to select the required bandwidth at each of their locations based on their current requirements and to upgrade as their needs change”); *id.* at 12 (MegaPath offers “business Ethernet services”); CALTEL, at 10 (Telepacific “offers three varieties of Metro or Carrier-Class Ethernet services: Ethernet over Copper, Ethernet via TDM (*i.e.* over legacy T1 and T3 circuits), and Ethernet over Fiber”); *id.* at 16 (“Creative Interconnect decided to rebuild its network and product portfolio from the ground-up, and offer[s] Hosted VoIP and Metro

and ILECs.⁶⁴ No provider has an inherent advantage in this marketplace, as evidenced by the fact that new entrants are some of the largest providers of Ethernet services.⁶⁵ This competition is driving competitors to make Ethernet services available to as many small- and medium-sized businesses as possible by using fiber facilities, legacy TDM facilities, wireless facilities, coaxial facilities, wholesale finished Ethernet services, and innovative Ethernet over Copper technologies.⁶⁶ As a result, small- and medium- sized businesses not only have access to the benefits of Ethernet services, but often have many choices among multiple providers.

The benefits that Ethernet services can provide to small- and medium-sized businesses are well documented. “Ethernet services provide significantly more bandwidth at substantially lower cost than legacy broadband services.”⁶⁷ They offer “plug and play” capabilities that make

Ethernet, over an-all Ethernet network, to meet the communications needs of its current and new small business customers.”).

⁶⁴ AT&T, at 10-19, 22-23; Verizon, at 12; Qwest, at 4.

⁶⁵ Today’s Ethernet playing field is fragmented and highly competitive. The majority of Ethernet ports today are not supplied by ILECs; no single provider has more than a 22 percent share of the overall business; 7 companies all have more than 5 percent; 8 of the 9 top providers lost share or remained steady for the last half of 2009, while the remaining providers experienced double digit increases. *See* AT&T at 3-4. *See also, e.g.*, Joint CLECs, at 13 (tw telecom “has the third highest market share of retail Ethernet ports in service”); XO, at 4, n.8 (“EoC has been one of XO’s fastest growing products”).

⁶⁶ *See, e.g.*, CALTEL, at 10 (TelePacific offers three varieties of Metro or Carrier-Class Ethernet services: Ethernet over Copper, Ethernet via TDM, . . . and Ethernet over Fiber”); *id.* at 18 (Creative Interconnect’s Ethernet product is different from other carriers because Internet traffic is transmitted in IP format on the carrier’s state-of-the-art all-Ethernet network”); Joint CLECs, at 7 (“Integra offers a host of integrated voice and data services and applications delivered over a full range of access methods, including . . . Ethernet-over-Copper, and Ethernet-over-Fiber”); Paetec, at 4 (Paetec’s “Ethernet Local Loop” product can be offered “often without a change to the customer’s fiber-fed loop.”); TWC, at 6 (TWC’s Metro Ethernet offering . . . [is] provided using fiber-coaxial and fiber optic technology”); XO, at 4 (“XO and numerous other competitive LECs have utilized EoC technology”).

⁶⁷ Joint CLECs, at 14; *see also, e.g., id.* at 4 (tw telecom’s “Ethernet services provide significantly more bandwidth at substantially lower costs than legacy services”); *id.* at 12 (“Small and medium-sized businesses are increasingly demanding MegaPath’s business Ethernet services because they provide more bandwidth at a lower cost, scalability to meet a growing

it more cost-effective because “[c]ircuits can be plugged into a LAN router with no need for expensive protocol conversion CPE.”⁶⁸ Ethernet services are also highly scalable, so that businesses can purchase the bandwidth they need, with the ability to “increase capacity or change service through remote adjustments rather than through the deployment of new electronics.”⁶⁹ And Ethernet services can be used to “provide[] multiple services, such as VoIP, private line, and Internet access, over a single connection,” which increases customer choice and further reduces costs.⁷⁰ Simply put, Ethernet allows flexible, scalable, lower cost solutions and supports a wider variety of applications and services.

Second, the record confirms that competition is driving significant increases in speeds for business broadband at the same or lower prices. For example, the cable companies confirm that they have “dramatically increased the speed of” their cable modem “broadband Internet offerings,”⁷¹ often “without corresponding price increases.”⁷² CLECs document the substantial

business’ bandwidth needs.”); XO, at 4 (Ethernet over copper technology “can reduce carriers’ ongoing operational expenses by at least twenty-three percent compared to the expenses incurred to operate technology that rely on TDM”); TWC, at 7 (Metro Ethernet provides a cost-effective alternative to frame relay, private line, and traditional T-1 services”).

⁶⁸ CALTEL, at 10.

⁶⁹ Joint CLECs, at 14; *see also, e.g., id.* at 8 (Ethernet “provide[s] businesses with the flexibility to select the required bandwidth at each of their locations based on their current requirements and to upgrade as their needs change”); XO, at 3 (Ethernet over copper “technology also gives carriers substantial operational flexibility, allowing them to expand capacity through a ‘pay as you grow’ installation of additional software and electronics”); Paetec, at 4 (Ethernet service “allows for bandwidth purchase in increments ranging from 10 Mbps to 1 Gbps”); CALTEL, at 10 (Ethernet service allows customers to “increase bandwidth incrementally” “without investing in new or additional CPE”).

⁷⁰ XO, at 3; Paetec at 4 (Ethernet “can be used for both data and voice traffic”); Joint CLECs, at 13 (Ethernet permits tw telecom to provide “Internet access, local and long distance voice, VoIP, VPN, and security” services); CALTEL, at 10 (“Ethernet over Copper” can “deliver integrated voice-and-data services”).

⁷¹ Comcast, at 4; *see also id.* at 5 (“Comcast, for example, currently offers it business customers Internet service “with a download speed of 50 Mbps,” but it is now “beginning to roll out a new Internet service that will be able to download data at speeds of up to 100 Mbps.”).

increases in speeds of their DSL offerings and other managed Internet services, and that they are offering small business customers “access to leading edge technology and a greater variety of enhanced services that are competitive with” existing service offerings.⁷³ Advances in fixed wireless provide business customers bandwidth ranging from about 10 Mbps to OCn level connections.⁷⁴ Mobile wireless providers have been constantly upgrading speeds from 2G, to 3G, and are now beginning to deploy 4G services.⁷⁵ And ILECs document their continued increases in bandwidth for their DSL and managed service offerings.⁷⁶

Third, providers are competing intensely to provide small businesses with innovative bundled offerings that give them additional benefits, flexibility, and cost savings. Cable companies, wireless providers CLECs and ILECs all offer bundles, including combinations of broadband, voice, and video, as well as mobile voice and mobile broadband, which allow broadband customers to obtain all of their communications needs from a single provider at substantial discounts.⁷⁷ Providers are also streamlining these bundled offers to provide greater simplicity for business customers. For example, AT&T’s “Business In A Box” solution provides a suite of business class voice and data services over a single network connection using a single

⁷² TWC, at 2.

⁷³ CALTEL, at 20; *see also, e.g., id.* at 24 (Sonic.net states that it has deployed “uncapped ADSL that runs as fast as . . . 20 Mbps.”).

⁷⁴ *See, e.g.,* Verizon, at 27-35; AT&T, at 17-19.

⁷⁵ *See, e.g.,* Verizon, at 27-35; AT&T at 23.

⁷⁶ AT&T, for example, has demonstrated that it continues to invest in technologies that will produce additional significant increases in DSL speeds, while at the same time cutting prices for its DSL services and other managed Internet services by 45 percent or more. *See* AT&T, at 20-21.

⁷⁷ *See, e.g.,* CALTEL, at 26; Joint Comments, at 4-5 (Cbeyond), 7 (Integra), 11 (Megapath), 13 (tw telecom); Paetec, at 2; Comcast, at 2; Charter, at 1; TWC, at 3-9; Verizon, at 6; Qwest, at 5; AT&T, at 8.

device on the customer premises that AT&T manages so the customer can concentrate on running its business.⁷⁸

Fourth, providers are adding other features and “hosted” services to their broadband offerings that further benefit small business customers. AT&T’s Tech Support 360 tools, for example, provide small and medium business customers a virtual IT helpdesk with live, remote technical support that provides PC Optimization, PC tune-ups, software installation services, as well as automated, online data backup service.⁷⁹ Likewise Comcast offers a “hosted platform that provides its Business Class Internet customers access to [a] . . . suite of ‘cloud-based’ . . . security, sharing, and storage” solutions that provide “small businesses [with] cost-effective access to the same communications tools used by many of the world’s largest corporations.”⁸⁰

Fifth, broadband providers are reaching out to small businesses in a variety of unconventional ways. AT&T, for example, documented programs in which it provides business planning, technical, and marketing assistance to businesses of all sizes seeking to develop the next generation of broadband applications and technologies, as well as new programs to give direct financial assistance to such entrepreneurs.⁸¹

C. The Market Is Addressing Middle Mile Connectivity For Rural Areas, And Any Action To Further Facilitate Broadband Deployment In Those Areas Should Be Done With Technology Neutral Subsidies.

The only legitimate issue relating to retail business broadband services raised by some commenters relates to very rural areas, where unique distance and density characteristics can create challenges for the deployment of “middle mile” facilities, *i.e.*, facilities that connect rural

⁷⁸ AT&T, at 21-22.

⁷⁹ *Id.* at 21-22.

⁸⁰ Comcast, at 5.

⁸¹ AT&T, at 24-28.

broadband providers to a point of interconnection with the Internet. Deploying facilities to remote locations typically involves significantly higher costs, both in terms of facilities (*e.g.*, fiber) and installation (*e.g.*, trenching). Moreover, because there are fewer homes and businesses located in these remote areas, these higher costs must typically be allocated over fewer customers, resulting in higher per-customer costs on average.⁸²

As the commenters recognize, however, marketplace participants are developing ways of mitigating and overcoming these cost challenges in many rural areas. For example, as the Blooston Carriers point out (at 10), many states now have low-cost statewide middle-mile fiber rings (often owned and operated by a consortium of rural telephone and broadband providers) and other states plan to follow suit (with private, state and federal funding).⁸³ These middle-mile fiber rings dramatically reduce per-user costs by aggregating statewide traffic onto a single very high capacity facility with multiple interconnection points spread throughout the state in close proximity to all but the most remote areas. Rural providers also have other ways of banding together into buying consortia to reduce costs – for example, one organization of ISPs, the Federation of Internet Solution Providers of America (“FISPA”), has used its combined purchasing power to obtain discounted backhaul facilities around the country.⁸⁴

The big story in rural areas, however, is wireless. In the Commission’s broadband workshops, participants confirmed that wireless backhaul options are increasingly available and

⁸² See Bringing Broadband To Rural American, Report on a Rural Broadband Strategy, Michael J. Copps, ¶ 113 (May 22, 2009) (“[r]ural broadband networks typically serve far fewer customers per square mile than urban and suburban networks, and often cover larger land areas that may include challenging topographies and climate conditions, making it extremely costly to provide broadband service to remote areas.”).

⁸³ See also, *e.g.*, *id.* ¶ 118 & n. 2301 (“Many rural cooperatives are deploying broadband to rural areas through collaborative efforts”).

⁸⁴ See FISPA website, <http://www.fispa.org/offers.php>.

cost-effective in rural areas.⁸⁵ Providers are also beginning to use abundant rural unlicensed “white spaces” spectrum.⁸⁶ Spectrum Bridge, for example, is rolling out services to electric companies, hospitals and other businesses using unlicensed White Spaces spectrum,⁸⁷ and FiberTower’s Chief Operating Officer has told Congress that a wireless connection using white spaces spectrum could be installed at a relatively low cost compared to “trenched fiber,” which “would normally be at least 20 or 30 times more expensive, not to mention the extended time period to build and implement.”⁸⁸ In addition, in very remote areas, satellite access may ultimately prove to be the most cost effective option.

In short, rural backhaul options are continually expanding and, as the economics of rural backhaul continue to improve, the marketplace will overcome remaining challenges in many

⁸⁵ See, e.g., Neville Ray, *National Broadband Plan Workshop*; Wireless Broadband Deployment – General Transcript, at 45-46 (Aug. 12, 2009) (“as you move to suburban fringe and rural areas, those [fiber] opportunities are much tougher to find, but there are good microwave solutions, as Ed [Evans, Stelera Wireless] mentioned, and some carriers are totally deploying their back haul solutions on a microwave basis”); Hunter Newby, *National Broadband Plan Workshop*; Deployment – Wired Transcript, at 30 (Aug. 12, 2009) (“it’s the combination of fiber and microwave, which for backhaul from towers that don’t have much fiber can cover a much larger swath of the country along this way”).

⁸⁶ See, e.g., Letter from Michele C. Farquhar, Sprint, to Marlene H. Dortch, FCC, Attachment at 6-15 (Oct. 28, 2009).

⁸⁷ Kevin Fitchard, *White Spaces Tackle the Smart Grid*, Connected Planet (June 23, 2010), available at <http://connectedplanetonline.com/topics/smart-grids/white-spaces-smart-grid-062310> (“Spectrum Bridge . . . [is] using the unlicensed spectrum in between TV channels to create a smart grid network in Plumas Sierra County, Calif., where the local electrical cooperative is trying to link its electrical substations in some of the most far-spread and difficult terrain in the Sierra Nevadas. But that’s not all. The wireless links are bringing some of the first terrestrial broadband connections to remote areas of the three-county area covered by the smart grid.”); Brian Dolan, *Google Eyes White Space For Wireless Health*, Mobihealthnews (Sep. 15, 2010), available at <http://mobihealthnews.com/8913/google-eyes-white-space-for-wireless-health> (“Google and Spectrum Bridge have outfitted a rural community hospital in Logan, Ohio with a WiFi and WiMAX network that runs over unused TV white spaces spectrum.”).

⁸⁸ Written Testimony of Ravi Potharlanka, COO FiberTower Corporation, House Energy and Commerce Committee’s subcommittee on Communications, Technology and the Internet Hearing: Competition in the Wireless Industry, at 7 (May 7, 2009).

areas. In the meantime, the Commission may need to take action, and history has shown that the best approach to this type of challenge is technologically and competitively neutral subsidy mechanisms. The Commission cannot accurately predict which business strategies and technologies will lead to the best and most cost-effective backhaul solutions in those areas, nor should it try. As commenters in this proceeding recognize, to the extent additional action is necessary, the Commission should adopt explicit and neutral subsidies carefully targeted to those rural areas that truly need help.⁸⁹

II. THE COMMISSION SHOULD REJECT THE SELF-SERVING PROPOSALS OF PROVIDERS SEEKING TO HAMPER COMPETITORS WITH INCREASED REGULATION.

Given the robust and self-sustaining facilities-based competition present in today's business broadband marketplace, the Commission can and should rely as much as possible on market forces, which will invariably do a better job of maximizing consumer welfare in competitive markets than even the most far-sighted agency regulations.⁹⁰ The primary parties complaining here are CLECs, but their complaints have nothing to do with customers – rather, they complain that they cannot obtain wholesale services in every conceivable instance at the rates that they would most prefer. And notwithstanding the facilities-based competition that now

⁸⁹ See, e.g., Blooston, at 11 (“sufficient federal High Cost support is going to be needed to help RLECs and other small carriers recover the substantial and increasing costs of Middle Mile connectivity.”).

⁹⁰ See First Report and Order, *Access Charge Reform*, 12 FCC Rcd. 15982, ¶ 289 (1997) (“But, precisely because of its directness and uniformity, rate regulation can only be, at best, an imperfect substitute for market forces. Regulation cannot replicate the complex and dynamic ways in which competition will affect the prices, service offerings, and investment decisions of both incumbent LECs and their the competitors. A market-based approach to rate regulation should produce, for consumers of telecommunications services, a better combination of prices, choices, and regulation of services not subject to substantial competition and with the prescriptive backstop described in Section IV.A, is thus consistent with the precompetitive regulatory goals of the 1996 Act and with our responsibility under Title II, Part I of the Communications Act to ensure just and reasonable rates”).

prevails in the broadband business marketplace, they ask the Commission to create entirely new regimes of Commission-managed “synthetic” competition, based on forced infrastructure sharing requirements and rate regulation.⁹¹

These requests are markedly anti-customer. Where, as here, *real* competition has taken hold, regimes of “synthetic” competition do nothing but impose massive administrative costs and create disincentives for investment, with no corresponding benefits. Indeed, these CLECs have made no case that there is a lack of competition that might justify, let alone require, the sort of extraordinary Commission intervention that these regimes of forced sharing would entail. To the contrary, these same CLECs *concede* that they compete successfully today against ILECs, cable companies, and wireless providers for retail broadband business, including small business customers. They acknowledge that they are leading broadband providers that have won hundreds of thousands of customers in the marketplace, that they have access to UNEs, special access, and numerous other ILEC-provided wholesale services that they use to compete for broadband business customers, and that they have widespread access to wholesale services offered by other CLECs, cable companies, and wireless providers.

When firms are competing successfully using the market-based wholesale options that are available, it is axiomatic that forced sharing requirements are counterproductive.⁹² That, however, does not deter CLECs intent on using the regulatory process to seek higher profit margins, and, to that end, they ask for everything under the sun. They ask the Commission to expand legacy regulations that would mandate infrastructure sharing and price controls on

⁹¹ See *USTA I*, 290 F.3d at 424.

⁹² See, e.g., *USTA II*, 359 F.3d at 592 (“competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates, where robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic”).

ILECs, including requests to slash ILEC special access prices (drawn from both the special access proceeding and the 271 obligations proceeding), to slash ILEC prices for finished wholesale Ethernet services, to force ILECs to maintain copper plant they do not need or use, to force ILECs to create from scratch new “packetized” wholesale broadband service offerings, and to mandate IP-to-IP interconnection services. Some of these requests are mutually contradictory: for example, some CLECs want the Commission to unbundle packetized fiber loops because they claim they cannot rely on copper, whereas others want the Commission to adopt burdensome restrictions on retirement of copper facilities because they claim they *need* copper to offer broadband services (and other CLEC commenters brag about their Ethernet over copper offerings).⁹³ Some of these requests rely on willful blindness to competitive realities: for example, in many cases these CLECs claim that they need these forced sharing requirements because they have no wholesale alternatives to the ILECs, even as other CLECs report that they routinely rely on cable and wireless wholesale alternatives.⁹⁴ And some of these claims are

⁹³ See, e.g., Joint Comments, at 30-31 (tw telecom claiming that it cannot rely on copper for Ethernet); XO, at 2-8 (explaining the significant success it has had with Ethernet over copper and seeking restrictions of ILEC retirement of copper facilities).

⁹⁴ See, e.g., Joint CLECs at 22-23 (Integra uses cable wholesale inputs); Paetec at 4 (explaining that Paetec offers “Fixed Wireless . . . service [as] an alternative last-mile and metro-area data and voice transport solution that can complement or replace a portion of a customer’s existing physical network infrastructure. Fixed Wireless can be either a standalone point-to-point solution, or bundled with other Paetec services as part of a business continuity solution to maximize a network’s operational efficiencies by sharing its communications load across multiple transport paths”); XO, <http://www.xo.com/services/network/Pages/broadband-wireless.aspx> (describing XO’s extensive use of wireless facilities); Presentation By Robert Dotson (CEO and President of T-Mobile USA) & Brian Kirkpatrick (CFO T-Mobile USA), T-Mobile USA: Regaining U.S. Market Position, Deutsche Telecom Investor Day, at 21, March 18, 2010 (T-Mobile already uses “alternative backhaul providers” for more than 40 percent of its 3G cell sites, and that it plans to increase its use of alternative backhaul to more than 75 percent by the first half of 2011.”); Yankee Group 4G Network Backhaul Summit, *PowerPoint Presentation of John Saw, CTO Clearwire* (Sept. 15, 2009) (Sprint’s “4G” provider, Clearwire, explaining that “90% of Clearwire cell sites use microwave backhaul; Largest wireless backhaul

simply patent overreaching: for example, while some of these CLECs essentially acknowledge that they compete successfully today, they claim they still need forced sharing in order to serve multi-location customers, even though other CLECs attach an analyst report showing that multi-location customers are *more* likely to choose CLECs over ILECs.⁹⁵

In the context of today's robust retail competition, such measures would be severely anticompetitive, for two principal reasons. First, expanding these monopoly-era regulations would harm consumers by creating disincentives for both ILEC and CLECs to continue investing in their networks and innovative broadband technologies. Infrastructure sharing mandates, like the unbundling rules, were historically recognized as a necessary evil to jump-start competition at a time when it was believed that facilities-based competition was economically impractical.⁹⁶ Such measures, however, create disincentives to invest: as the D.C. Circuit explained in upholding the Commission's decision to not require unbundling of ILEC broadband facilities,

network in North America"; "Rapid rollout," "Very low recurring costs," "Tremendous scalability, 50 Mbps – 1 Gbps of backhaul per site").

⁹⁵ See, e.g., CALTEL, Attachment, Deloitte, A Window of Opportunity, at 6 (2006) ("[m]ultisite [small business customers] are more likely to choose a [CLEC] for complete data-centric services.").

⁹⁶ *AT&T Corp. v. FCC*, 525 U.S. 366, 428 (1999) (Justice Breyer concurring in part and dissenting in part) ("[G]iven the Act's basic purpose, it requires a convincing explanation of why facilities should be shared . . . where a new entrant could compete effectively without the facility, or where practical alternatives to that facility are available, [given] that compulsory sharing can have significant administrative and social costs inconsistent with the Act's purposes suggests the same. Even the simplest kind of compelled sharing, . . . means that someone must oversee the terms and conditions of that sharing [and] a sharing requirement may diminish the original owner's incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research, or labor. . . . Nor can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement"); see also *USTA v. FCC*, 359 F.3d 554, 564 (D.C. Cir. 2004) (there must be a "balance between the advantages of unbundling (in terms of fostering competition by different firms, even if they use the very same facilities) and its costs (in terms of both spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities)").

“[a]n unbundling requirement . . . seems likely to delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy [broadband facilities] and ILECs fearful that CLEC access would undermine the investments’ potential return,” whereas the “[a]bsence of unbundling, by contrast, will give all the parties an incentive to take a shot at this potentially lucrative market.”⁹⁷ The Commission has thus quite properly sought to minimize regulation of broadband services and has predicted the “end result [will be] that consumers will benefit from [a] race to build next generation networks and . . . increased competition in the delivery of broadband services.”⁹⁸ That is precisely what has happened, and indeed, on the record in this proceeding, these cases establish that it would be flatly unlawful to impose intrusive infrastructure sharing and price regulations like those proposed here.

Second, the CLECs’ proposals here would be even more perverse, because they would penalize one set of competitors – the ILECs – while giving below-cost access to wholesale inputs to another set – the CLECs. In other words, such measures would give an unwarranted leg up to one set of competitors at the expense of another, and given the CLECs’ phenomenal success in the marketplace, there is no justification for further distorting the competitive landscape in this fashion – particularly since other *facilities-based* competitors (*e.g.*, cable and fixed wireless) are not subject to *any* unbundling obligations and are competing aggressively without the need for regulatory hand-outs. Indeed, the Commission and the courts have repeatedly held that the “Communications Act requires [the Commission] to focus on competition that benefits the public

⁹⁷ *United State Telecom Ass’n. v. FCC*, 359 F.3d 554, 580 (D.C. Cir. 2004) (“*USTA II*”).

⁹⁸ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of The Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 18 FCC Rcd. 16978, ¶ 272 (2003).

interest, not on equalizing competition among competitors.”⁹⁹ The mere fact that some competitors may have developed certain marketplace advantages is not a basis for regulation, as long as competition itself is still functioning. As the Commission explained in its *Interexchange Competition Order*, when speaking of the superior size, financial strength, and technological advantages of legacy AT&T when it was the sole dominant long-distance carrier, “[t]he issue is not whether AT&T has advantages, but, if so, why, and whether any such advantages are so great as to preclude the effective functioning of a competitive market.”¹⁰⁰ “Indeed, the competitive process itself is largely about trying to develop one’s own advantages, and all firms need not be equal in all respects for this process to work.”¹⁰¹

These CLECs have not shown, and cannot show, that absent a grant of any or all of the items of their wish list there will be any harm to competition. The CLECs try to dress up their

⁹⁹ *In re Applications of Craig O. McCaw, Transferor, and American Tel. & Telegraph Co., Transferee*, 10 FCC Rcd. 11786, ¶ 9 (1995); *SBC v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) (“[t]he Commission (FCC) is not at liberty . . . to subordinate the public interest to the interest of equalizing competition among competitors”) (internal quotations omitted); *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974); *Applications of Motorola, Inc. for Consent to Assign 800 MHz Licenses to Nextel Communications, Inc.*, 10 FCC Rcd. 7783, ¶ 20 n.58 (public interest requires promoting competition, not “equalizing competition among competitors”); *United States v. Western Elec. Co.*, 969 F.2d 1231, 1243 (D.C. Cir. 1992) (to the extent that parties contend that communications laws “should be interpreted to aid the minnows against the trout, such as AT&T and MCI (effectively devaluing the investments those companies have made in extending their CCS networks to more LATAs), they are simply wrong”); Order and Authorization, *Application of Alascom, Inc. AT&T Corporation and Pacific Telecom, Inc. For Transfer of Control of Alascom, Inc. from Pacific Telecom, Inc. to AT&T Corporation*; and *Application of Alascom, Inc. For Review of Authorization to Acquire and Operate a Fiber Optic Cable System between Alaska and Oregon for the Provision of Interstate Switched and Private Line Services*, 11 FCC Rcd. 732, ¶ 56 (1995).

¹⁰⁰ Report and Order, *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd. 5880, ¶ 60 (1991).

¹⁰¹ *Id.*; see also *id.* (incumbent firms may have many advantages, including “perhaps, resource advantages, scale economies, established relationships with suppliers, ready access to capital, etc.,” but the mere fact that a firm has these advantages does not mean that it is “appropriate for government regulators to deny the incumbent the efficiencies its size confers in order to make it easier for others to compete”).

proposals by claiming that such measures would enable them to offer new services, like cloud computing, software-as-a-service, or other products,¹⁰² but these CLECs provide no data or other evidence to support any of these claims. In fact, business customers already have access to these services today from a wide array of firms, including non-traditional providers like Cisco,¹⁰³ and in many instances these CLECs themselves are already offering these services.¹⁰⁴

The CLECs' attempt to press for these monopoly-era requirements is all the more ludicrous considering that the CLECs continue to refuse to submit any meaningful competitive data to support their broad claims that there is a lack of competition. With great fanfare, prior to filing their comments in this proceeding, the CLECs filed a motion seeking a stringent protective order so they could supply super-sensitive "granular" and "detailed" information concerning the

¹⁰² Joint CLECs, at 17.

¹⁰³ See, e.g., Cisco, <http://www.cisco.com/en/US/netsol/ns1007/services.html> (offering small businesses video conferencing and online collaboration); Cisco New Release, *Cloud Services and SaaS: A Smarter Way to do Business*, Mar. 29, 2010 (discussing Cisco's cloud computing and software as a service (SaaS) offerings and explaining that according to "a recent Cisco survey 75 percent of SMBs polled are already using some kind of hosted or subscription-based service to enhance business services" and "SMBs have been among the most aggressive adopters of SaaS").

¹⁰⁴ See, e.g., tw telecom Press Release, tw telecom Collaborates with Cisco, BT to Deliver TelePresence Conferencing Solutions (May 14, 2010) ("tw telecom, a leading national provider of managed voice, Internet and data networking solutions for businesses across the U.S. and globally, today announced it is collaborating with Cisco and BT Conferencing to deliver a comprehensive high-definition business video conferencing solution in the U.S. This solution . . . creates a live, face-to-face communication experience that empowers people to collaborate like never before. . . . It helps people meet, share content, create high-quality video recordings and events, consult with experts and deliver powerful personalized services, all using the power of the network for an immersive in-person experience."); tw telecom Presentation, tw telecom Delivers Healthy Cost Cuts for HealthPlus Hospitals, *available at* <http://www.twtelecom.com/Documents/Resources/PDF/cs/HealthPlusCaseStudy.pdf> (describing how tw telecom is support the healthcare facilities secure transport of patient images); tw telecom website, http://www.twtelecom.com/cust_solutions/services/mg_security.html (explaining the various security and data protection services offered by tw telecom). See also Comcast at 5 (explaining that it "maintains a hosted platform that provides its Business Class Internet customers access to Microsoft's suite of 'cloud-based' email, . . . sharing, . . . and storage" applications.").

state of competition in this proceeding.¹⁰⁵ The Commission granted the request, stating that such data is “necessary” and actually “requir[ing]” CLECs to produce it.¹⁰⁶ As it turns out, however, only two CLECs – Integra and tw telecom – submitted any data under the Commission’s Protective Order, and these data are not “detailed,” “granular,” or relevant, and none of supposedly secret bald assertions is documented or verifiable.

This confidential data contains no information on the location of their networks and other networks, the proximity of those networks to small businesses, wholesale options available to them, bids to provide services that they have won or lost, or anything else that might actually be useful to assessing their bald assertions that they lack alternatives and pay excessive fees for ILEC services. Instead, these CLECs submitted unsupported assertions regarding (1) the number of buildings they serve using ILEC provided facilities and (2) the average revenues they claim they need to justify building their own facilities along with claims that their actual revenues are below those levels. These are the same types of unsupported assertions the CLECs have been repeating for years, which as before, the Commission cannot possibly take seriously absent meaningful, detailed information on the scope of their networks and their competitive opportunities.

In particular, the mere fact that a CLEC may use a high proportion of UNEs, special access, or any other wholesale ILEC services provides no information at all as to the choices *available* to them for connecting to commercial buildings. Regardless of the supplier choices that any particular CLEC has made in the past for whatever reasons, the record in this proceeding (and in the Commission’s special access docket, WC Docket No. 05-25) establishes that there are

¹⁰⁵ Letter from Thomas Jones (Cbeyond, Integra, tw telecom) to Marlene H. Dortch (FCC), WC Docket No. 10-188 (Sep. 30, 2010).

¹⁰⁶ Second Protective Order, *Business Broadband Marketplace*, WC Docket No. 10-188, ¶ 3 (Oct. 14, 2010).

many suppliers competing to provide wholesale services, including numerous other CLECs, cable companies and wireless providers. And given that UNEs are priced below cost, it is hardly surprising that many CLECs have chosen to rely on UNEs rather than purchase services at competitive prices or deploy their own facilities. Indeed, if anything, some CLECs' continued reliance upon UNEs only highlights the problems with mandatory bargain basement unbundling requirements – they create significant disincentives to build out or self supply competing facilities.

Back of the envelope and entirely undocumented assertions of the typical cost of building connections and of the average revenues needed to justify those costs are equally unhelpful.¹⁰⁷ Where there is no need to document or support such assertions or even detail all of the assumptions that have been made, CLECs will always feel safe ignoring the measures they employ in the real world – such as the availability of existing conduit at regulated rates and the potential to deploy low cost wireless last mile connections – to deploy facilities at much less cost to provide services of much lower bandwidth than they claim here. Indeed, AT&T regularly receives requests by CLECs and cable companies for access to existing conduit – including, from many commenters in this proceeding – and in the vast majority of cases, those requests can be accommodated.

Moreover, in many cases the business customer is located in a greenfield location with no existing facilities, or is seeking to upgrade from a copper to a fiber facility. In those cases, ILECs clearly have no inherent cost advantage over the CLECs. As Qwest has documented, “[t]o replace copper” or to build to a new location, an ILEC “must do what any competitive

¹⁰⁷ Joint CLECs, at 21.

provider must do: it must hire work crews to lay new conduit.”¹⁰⁸ “Even in those cases where existing conduit can be used to deploy new fiber – for example, where an ILEC has previously deployed fiber to the same location – an ILEC’s rival can make use of that conduit on favorable regulated terms.”¹⁰⁹ “The result is that ILECs and their rivals face essentially the same costs to deploy . . . and each competes on a level playing field.”¹¹⁰

In this regard, AT&T shares the view of the U.S. Small Business Administration (SBA) that the Commission should take a hard look at the records in each of the existing proceedings that the Commission has initiated in the last few years to consider CLEC forced sharing requests, obtain any additional data it needs to answer the questions posed in those proceedings, and act “quickly and decisively” on the basis of record evidence.¹¹¹ Each of these issues has been fully briefed in these separate Commission dockets and in each case the record shows that the proposed regulations would be harmful to small businesses and the economy. SBA lists concerns that have been raised by the same CLECs that are participating in this proceeding, but it does not endorse any of those proposals and notes that it will soon issue its own report. AT&T looks forward to reviewing the report.

With this in mind, some of the principal problems with each of the CLECs’ regulatory proposals are set forth below.

1. Copper Retirement. Even though the Commission has previously declined to “require affirmative regulatory approval prior to the retirement of any copper loop facilities,” concluding

¹⁰⁸ See Letter from Jonathan E. Nuechterlein (Qwest) to Marlene H. Dortch (FCC), WC Docket No. 05-25, RM-10593, at 3-4 (Oct. 26, 2010).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Comments of the Office of Advocacy, U.S. Small Business Administration, at 3.

that its “existing rules” already provide “adequate safeguards,”¹¹² some CLECs urge the Commission to grant a pending petition for rulemaking in another docket¹¹³ and to adopt burdensome new requirements regarding the ILECs’ maintenance of retired copper loops.¹¹⁴ The records in the Triennial Review proceeding, in the pending rulemaking docket, and in this proceeding all demonstrate that the Commission’s existing policies are working well, and these CLECs provide no valid reason for the Commission to change its rules on copper loops.

First, the CLECs have never (either here or elsewhere) offered any valid evidence to support their claim that the ILECs’ retirement of copper facilities, under the Commission’s existing procedures, has harmed competition for broadband or other services. AT&T and other ILECs currently maintain literally tens of millions of copper loop facilities, yet the CLECs have cited only a handful of instances in recent years in which an ILEC has retired any copper loop facilities. Indeed, out of these tens of millions of copper loops, AT&T has had a total of just *ten* copper retirements since 2007 in its legacy 13-state region and just 117 retirements in its 9-State region. In most cases, these retirements were triggered by events outside of AT&T’s control, such as road moves, relocation of facilities, damage to facilities, and in some cases in the southeastern states by USF-funded projects to improve service by moving services off longer copper loops. And, in virtually all cases, copper feeder was converted to a digital loop carrier facility with no change to the copper facilities at existing customer premises. In short, the

¹¹² *TRO*, ¶ 281.

¹¹³ Petition for Rulemaking and Clarification, *Policy rules Governing Retirement of Copper Loops and Copper Subloops By Incumbent Local Exchange Carriers*, RM Docket No. 11358 (filed Jan. 18, 2007).

¹¹⁴ See Joint CLECs, at 31-32; Comments of 271 Coalition, at 15-17 (“271 Coalition”); XO, at 5-7; Paetec, at 13.

CLECs have failed to show that ILEC copper retirement has posed any problem that calls out for any solution, let alone the detailed and burdensome requirements that the CLECs have proposed.

Second, the CLECs' proposals for new and expanded regulations would be flatly inconsistent with key components of the Commission's broadband regulatory regime, which is designed to stimulate and promote deployment of next-generation infrastructure by ILECs and CLECs alike. In particular, their proposals would force ILECs to maintain redundant copper loop facilities, and deny them the ability to efficiently manage and upgrade their networks, on the off chance that a CLEC might someday seek to use those copper facilities to provide broadband services. In this regard, the rules sought by the CLECs are plainly more intrusive and burdensome than a simple requirement to leave copper lines where they lie. Rather, ILECs would be forced to expend resources to maintain those facilities, the related equipment (*e.g.*, terminals, cabinets, pedestals), and the legacy operating systems that had been used for functions like ordering, testing, maintenance, accounting and billing.¹¹⁵ Forcing companies to maintain unneeded copper facilities after they have deployed fiber would be like requiring a factory to maintain and continue operating its old machines after it purchased new, state-of-the-art equipment.¹¹⁶ The CLECs' proposed rules not only would discourage ILEC investment in fiber and other facilities to upgrade their networks to provide broadband services, but also would

¹¹⁵ In this regard, the CLECs' proposed rules would skew competition, as one set of providers (*e.g.*, cable operators, fixed and mobile wireless providers, and facilities-based CLECs) could deploy the most efficient broadband facilities without regard to obligations regarding older facilities, while one set, the ILECs, alone would be forced to maintain a costly, redundant, legacy network.

¹¹⁶ Comments of Corning, Inc., *Policies and Rules Governing Retirement of Copper Loops by ILECs*, Docket No. RM-11358, ¶ 8 (Mar. 1, 2007) ("Operating two networks is more expensive than operating one of those networks and will affect return on investment . . . having the option of retiring the copper facilities can have an important positive effect on investment returns, and thus the decision to invest in fiber in the first place.")

decrease CLEC incentives to deploy their own broadband facilities, contrary to Commission policy and the objectives of the 1996 Act.

In this proceeding, the CLECs put a new spin on the argument by asserting that recent technological changes have made it possible to use copper to offer high-speed services, such as “Ethernet over Copper.” But the claim that copper might be more “useful” misses the point of the unbundling rules and the Commission’s approach to broadband. The Commission previously declined to impose more detailed rules for copper retirement because, as described above, that would place unnecessary and burdensome obligations on one set of broadband providers and would reduce incentives for all providers to deploy their own broadband facilities. The mere fact that copper loops can be used for Ethernet services does not change those burdens or the disincentives to invest.

2. “*Packetized Bandwidth.*” The CLECs also raise claims, which are likewise pending in an existing proceeding,¹¹⁷ that the Commission should amend its unbundling rules to require access to the “Packetized Bandwidth” of FTTH, FTTC, and Hybrid Loops, which they say is needed to provide high-capacity connections to small businesses.¹¹⁸

The short answer to these CLECs’ claims is that, as described above, the comments in this proceeding establish that competitors are already providing broadband services at speeds of 6 Mbps and above to small businesses throughout the country, using both their own facilities and various combinations of ILEC facilities. Cable companies all report that they use their own facilities to offer small business customers broadband speeds in excess of 6 Mbps. Wireless providers report that they, too, use their own facilities to offer small business customers

¹¹⁷ Petition for Expedited Rulemaking, *Cbeyond, Inc. Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3) of the Act*, WC Docket No. 09-223 (filed Nov. 16, 2009) (“Cbeyond Petition”).

¹¹⁸ See, e.g., Joint CLECs, at 25-29; Paetec, at 13; 271 Coalition, at 17-18.

broadband speeds in excess of 6 Mbps. And, notwithstanding their claims as to this new “packetized bandwidth” service, even the CLECs admit that they have deployed their own facilities to offer business customers broadband speeds in excess of 6 Mbps – tw telecom, for example, states that the majority of its customers are “on net.” Further, the record confirms that CLECs are already using existing ILEC offerings, including UNEs, TDM-based DSn services, and finished broadband products to provide such services.¹¹⁹ Access to a new ILEC “packetized bandwidth” unbundled element is thus clearly unnecessary to facilitate competition for such services.

Consequently, the CLECs’ request fails as a legal matter, because there are no grounds on which the Commission could find that CLECs are impaired, within the meaning of Section 251(c)(3), without access to this “packetized bandwidth.” As the D.C. Circuit has explained, “[t]he fact that CLECs can viably compete without UNEs . . . precludes a finding that the CLECs are impaired.”¹²⁰ In addition, the Commission’s unbundling rules provide that impairment exists only when “lack of access to [an] element poses a barrier or barriers to entry . . . that are likely to make entry into a market by a reasonably efficient competitor uneconomic.”¹²¹ But the record evidence demonstrates that reasonably efficient CLECs can enter the market and compete without access to “packetized bandwidth” – either using their own facilities or existing regulated or market-priced wholesale inputs. Further, the notion that CLECs lack access to ILEC facilities

¹¹⁹ Indeed, the CLECs cannot even get their story straight: in stating their claims for additional rules on retirement of ILEC copper, the CLECs concede that they can readily use ILEC copper facilities to provide broadband services. While this is, as explained above, no reason to adopt new rules to limit the retirement of ILEC copper, it shows that there is no reason to adopt new unbundling requirements on fiber.

¹²⁰ *Covad Communications v. FCC*, 450 F.3d 528, 534 (D.C. Cir. 2006); *see also USTA II*, 359 F.3d at 575.

¹²¹ 47 C.F.R. § 51.317(b).

in the locations where the CLECs want them is simply not true. The CLECs readily admit that there are unbundled loop alternatives available – for example copper loops and subloops, and TDM-based DS-1 and DS-3 loops – that can be used to provide their services to business customers. And, of course, ILECs like AT&T provide finished Ethernet services at wholesale for CLECs to purchase. CLECs thus have a variety of means to compete without new unbundling requirements.

Further, and in any event, although the precise nature of the CLECs' unbundling request is unclear, it appears to be unlawful for additional reasons, even if (contrary to fact) there were impairment. To begin with, unbundled network elements are meant to provide access to ILEC *facilities*, not to services, and the “packetized bandwidth” that the CLECs are requesting appears to resemble a service rather than a facility. Thus, in the underlying proceeding, Cbeyond asserted that it wanted unbundled access to “a high-bandwidth connection, between 6 and 10 Mbps” over a “bitstream transmission path from the small business end user to a central aggregation point in the incumbent LEC's network in a LATA.”¹²² In this regard, it does not appear that ILECs currently offer such services at retail, and there is no legal basis in the Act for the Commission to require ILECs to modify their networks to provide access to a new and unique service.¹²³

3. *Ethernet.* The Joint Commenters assert that “[a]s a direct result of [the Commission's broadband forbearance] decisions, competitors such as tw telecom have been unable to obtain Ethernet loops at wholesale on just and reasonable and nondiscriminatory rates, terms and

¹²² Cbeyond Petition, at 21-22.

¹²³ See, e.g., *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997) (Section 251 requires access “only to an incumbent LEC's existing network – not to a yet unbuilt superior one”).

conditions.”¹²⁴ This is false. AT&T provides wholesale Ethernet services at negotiated rates to a number of CLECs, including some of those complaining here that they have been unable to obtain such services.

In any event, CLECs have not needed unbundling or rate regulation of Ethernet loops to be successful in the marketplace. To the contrary, they were successful Ethernet suppliers long before they negotiated wholesale Ethernet deals with AT&T and others. tw telecom, for example, previously touted on the front page of its website that it has already overtaken one RBOC in terms of Ethernet market share and that tw telecom is now the number three supplier of Ethernet services nationwide.¹²⁵ And tw telecom has elsewhere admitted that its historical success was achieved without the need to purchase any tariffed Ethernet service from AT&T.¹²⁶ The Commission has thus properly rejected the arguments repeated here by tw telecom, explaining that “competitive carriers lead incumbent LECs in the deployment of Gigabit Ethernet switches,”¹²⁷ and that tw telecom’s claims of a lack of competition for Ethernet services are “inconsistent with [tw telecom’s] public statements that [tw telecom] can cost-effectively deliver Ethernet services to customers anywhere, even where it may be uneconomical to build facilities connecting [tw telecom’s] network to the customers’ premises.”¹²⁸

¹²⁴ Joint CLECs, at 31.

¹²⁵ See <http://www.twtelecom.com/>.

¹²⁶ See *Ex Parte* Letter from Thomas Jones (tw) to Marlene H. Dortch (FCC), WC Docket No. 06-74, at 6 (Nov. 20, 2006) (tw “has not purchased a single Ethernet circuit from AT&T under tariff”).

¹²⁷ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 18 FCC Rcd. 16978, ¶¶ 537-39 (2003); see also Order, *Qwest Petition for Waiver of Pricing Flexibility Rules for Advanced Communications Networks Services*, 22 FCC Rcd 7482, ¶ 6, n.23 (2007) (same).

¹²⁸ *Petition of ACS of Anchorage Forbearance Petition*, FCC 07-149, WC Docket No. 06-109, 2007 FCC LEXIS 6046, ¶ 102 (2007).

While it is clear that tw telecom can self-deploy Ethernet services and obtain finished wholesale Ethernet services from AT&T and others, even if that were not the case, tw telecom could still provide such services using TDM-based loops – either below cost UNEs or special access – together with its own Ethernet electronics. tw telecom recognizes this, but it asserts (at 32-33) that it is not economically feasible to provide Ethernet services in this way. That is simply not true, and, in fact other CLECs, like XO, flatly refute the point. As XO explains in its comments, “advances in copper technology” have enabled the deployment of Ethernet Over Copper (‘EoC’) technology, which supports data speeds up to “45 Mbps today and possibly greater than 100 Mbps in the future.”¹²⁹ AT&T itself has long provisioned Ethernet services in this way,¹³⁰ and tw telecom has elsewhere admitted that it does so as well quite successfully.¹³¹ For this reason also, the Commission has previously “reject[ed] [tw telecom’s] assertion that TDM-based loops cannot in many instances be used to provide packetized broadband services to enterprise customers,” and it has found this assertion to be “inconsistent” with tw telecom’s public statements and with the fact that tw telecom “has been able to compete in the provision of Ethernet services by relying on special access TDM loops (in addition to its own facilities).”¹³²

¹²⁹ XO, at 3.

¹³⁰ Reply Declaration of Parley C. Casto, *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from BellSouth Corporation to AT&T Inc.*, WC Docket No. 06-74, ¶ 10 (filed June 20, 2006).

¹³¹ See Reply Declaration of Graham Taylor, ¶ 9, attached to Response of Time Warner Telecom, Inc. to AT&T Inc. and BellSouth Corporation Joint Opposition to Petitions to Deny and Reply to Comments, enclosed within August 8, 2006 Ex Parte Letter from Thomas Jones, counsel for Time Warner, to Marlene H. Dortch. See also Supplemental Declaration of Parley C. Casto, *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from BellSouth Corporation to AT&T Inc.*, WC Docket No. 06-74, ¶¶ 6, 11-19 (filed Aug. 21, 2006).

¹³² See, e.g., Memorandum Opinion and Order, *Petition of AT&T Inc. for Forbearance*, FCC 07-180, WC Docket No. 06-125, ¶ 26 (rel. Oct. 19, 2007).

And of course, tw telecom also has the option of using below-cost UNE loops, which are widely available, to provide Ethernet services by adding the necessary electronics.

4. *Special Access Regulation.* Naturally, the comments would not be complete without Sprint arguing yet again for special access regulation. In the ongoing special access proceeding, the Commission has already collected an extensive record that confirms that CLECs, cable companies and microwave wireless providers have deployed extensive alternative facilities, both in the downtown areas where special access demand is traditionally concentrated, and in suburban and rural areas where broadband wireless backhaul demand is attracting extraordinary investment by alternative backhaul providers.¹³³ The record compiled here provides further refutation of any notion that mandated rate reductions for ILEC special access are necessary, because that record confirms retail competition for business customers is flourishing, with intense competition from multiple facilities-based providers.

Indeed, the record shows that Sprint itself is taking advantage of these many alternatives. For example, Sprint's "4G" mobile service relies on Clearwire's WiMax network, and Clearwire has stated that *90 percent* of its wireless network is served by microwave backhaul.¹³⁴ Likewise, T-Mobile has explained that it *already uses* "alternative backhaul providers" for more than *40 percent* of its 3G cell sites, and that it plans to increase its use of alternative backhaul to

¹³³ See, e.g., *Ex Parte* Letter from Christopher Heimann (AT&T) to Marlene H. Dortch (FCC), WC Docket No. 05-25 (filed April 15, 2010); Reply Comments of AT&T Inc., WC Docket No. 05-25, at 28-38 (filed Jan. 24, 2010); *Ex Parte* Letter from Donna Epps (Verizon) to Marlene H. Dortch (FCC), WC Docket No. 05-25 (filed June 7, 2010); *Ex Parte* Letter from Christopher Heimann (AT&T) to Marlene H. Dortch (FCC), WC Docket No. 05-25 (filed June 17, 2010).

¹³⁴ Yankee Group 4G Network Backhaul Summit, *PowerPoint Presentation of John Saw, CTO Clearwire* (Sept. 15, 2009) ("90% of Clearwire cell sites use microwave backhaul; Largest wireless backhaul network in North America"; "Rapid rollout," "Very low recurring costs," "Tremendous scalability, 50 Mbps – 1 Gbps of backhaul per site").

more than 75 percent by the first half of 2011.¹³⁵ Other wireless carriers, large and small, also report that they have ready access to alternatives to ILEC DSn-level special access services, even in very rural areas. For example, US Cellular Corp., has reported that it “makes very extensive use of . . . common carrier microwave facilities to link its base stations with each other and with USCC’s switches,”¹³⁶ and, indeed, already has such backhaul facilities to at least 40 percent of its cell sites.¹³⁷ And, Hilbert Communications, which “offers roaming network services throughout Wisconsin for about 30 carriers,” recently reported that it will be “eliminating the 150 leased T1 lines that it uses to connect its cell sites” and that it will replace them with microwave wireless backhaul facilities.¹³⁸ As Qwest correctly points out, wireless carriers continue to issue RFPs for service to large portions of their cell towers, and ILECs typically compete against responses from CLECs, cable companies, wireless providers, and fiber wholesalers.¹³⁹

Sprint has not made any serious attempt to show, with *facts*, that special access rates are harming or will harm wireless competition, and the new information it provides here is misleading at best. Sprint now asserts that it is unable to effectively compete against AT&T and Verizon for government contracts because the special access services that they offer to Sprint are

¹³⁵ Presentation By Robert Dotson (CEO and President of T-Mobile USA) & Brian Kirkpatrick (CFO T-Mobile USA), T-Mobile USA: Regaining U.S. Market Position, Deutsche Telecom Investor Day, at 21, March 18, 2010.

¹³⁶ Comments of U.S. Cellular Corp. (“USCC”), WT Docket No. 09-106, at 1 (filed Jul. 27, 2009).

¹³⁷ In July 2009, USCC reported that it had 2,350 microwave backhaul connections, *id.*, out of about 6,400 total cell sites. http://en.wikipedia.org/wiki/U.S._Cellular. USCC thus has microwave backhaul connections to approximately 40 percent of its cell sites.

¹³⁸ Jessica Scarpati, Rural Wireless Operator Ditches T1s For Microwave Backhaul, Telecom News, Feb. 25, 2010, *available at* http://searchtelecom.techtarget.com/news/article/0,289142,sid103_gci1394530,00.html.

¹³⁹ See Letter from Jonathan E. Nuechterlein (Qwest) to Marlene H. Dortch (FCC), WC Docket No. 05-25, RM-10593, at 2 (Oct. 26, 2010).

allegedly priced higher than the retail prices they offer to the government. First, verifiable publicly available data refutes Sprint's claims that it cannot compete effectively against AT&T and Verizon for government contracts. The government purchases communications services under its "Networx" program. Carriers that qualify for a Networx program compete against each other for each individual contract (*e.g.*, to provide services requested by a particular government agency). Sprint qualifies for the Networx Enterprise program and thus competes against AT&T, Verizon, Qwest and others to win business from the government.¹⁴⁰ Government data suggests that Sprint has won more than one third of these Networx Enterprise government contracts.¹⁴¹

But even on its own terms, Sprint's comparison is unreliable. Sprint's rate comparison is based on an examination of specific rate elements from the government contract, but specific rate elements in this context are meaningless. Providers bid for complete circuits that connect the government location to the carrier's POP, including channel terminations, transport, ports, entrance facilities, and so on. The government does not bid out each piece part of the circuit, and therefore it is misleading to imply that the government has separately purchased these sub-components. Furthermore, the prices that Sprint says AT&T offers for the DSn access components under its government contracts appear to be significantly overstated. Both AT&T's average DS1 and DS3 circuit revenue and the average prices Sprint pays AT&T for such services are significantly lower than the prices identified in Sprint's filing.

¹⁴⁰ See *Sprint gets piece of U.S. government telecommunications contract*, New York Times (May 31, 2007).

¹⁴¹ See U.S. General Service Administration, <http://gsa.gov/graphics/fas/FOStatus06082010revised.xls>. Industry reports also cite several CLECs as "Rising Government Communications Stars," including tw telecom and XO Communications. Sean Buckley, *Competitive Carriers Carve Out Public Sector Service Niche*, Fierce Telecom (Nov. 4, 2010), available at http://www.fiercetelecom.com/special-reports/competitive-carriers-carve-out-public-sector-service-niche?utm_medium=nl&utm_source=internal.

Equally important, the prices reported in Sprint's comparisons are completely undocumented and unverifiable. Sprint does not identify the government contracts used in the comparison. Nor does Sprint explain how it computed the AT&T and Verizon prices used in the comparison. It states only that they are some sort of "average" of prices from "randomly selected" wire centers.¹⁴² Sprint does not state which wire centers it chose, or how it computed the average (*e.g.*, weighted averages by the number of lines in each wire center, a simple average, or some other average). Without any explanation of how Sprint generated these numbers, neither the Commission nor any other party can test the veracity of Sprint's claims, and therefore the Commission should give them no credence whatsoever.

Section 271. A few CLEC commenters also rehash arguments from another docket in which they are seeking a rulemaking to require unbundling and regulation of ILEC broadband facilities under Section 271 of the Act.¹⁴³ These CLECs offer nothing new in their comments here, and merely cite to their comments in that ongoing proceeding. These requests must be denied for all the reasons explained by AT&T and others in that proceeding.

First, the comments in that proceeding confirm that, as here, what these CLECs are really seeking is essentially the same relief they are requesting in the special access docket – *i.e.*, mandated rate reductions in the guise of cost-based rates for the BOCs' Section 271 local loop transmission and transport. As in the special access proceeding, however, these CLECs have submitted no evidence that there is any market failure in the special access or broadband marketplaces. Indeed, the CLECs have consistently refused to provide any competitive data to

¹⁴² Prices under the government contracts at issue here vary by wire center.

¹⁴³ See Section 271 Coalition, at 18-20; Paetec, at 13; *see also* Petition for Expedited Rulemaking, *Petition for Expedited Rulemaking to Adopt Rules Pertaining to the Provision by Regional Bell Operating Companies of Certain Network Elements Pursuant to 47 U.S.C. § 271(c)(2)(B) of the Act*, WC Docket No. 09-222 (filed Nov. 9, 2009) ("Section 271 Coalition Petition").

support their claims, and instead have merely attempted to recharacterize the relief they are seeking as Section 271 unbundling requirements.

More fundamentally, their requests are unlawful. The Commission and the courts have consistently recognized important distinctions between unbundled network elements under Section 251, and elements available under section 271. Although Section 251 elements are to be offered at TELRIC, the rates for Section 271 elements are to be set by the market.¹⁴⁴ The Commission has held that when a facility is unbundled under Section 271 but not Section 251, “competitors can acquire [that facility] in the marketplace at a price set by the marketplace” – “the market price should prevail.”¹⁴⁵ Indeed, the Supreme Court has noted that the TELRIC standard of Sections 251 and 252 is “radically unlike” the “just and reasonable standard” that governs Section 271.¹⁴⁶ The Commission has specifically declined to promulgate rules to implement that standard in the context of Section 271, instead preferring to permit a case-by-case showing that the BOC had “entered into arms-length agreements with other, similarly-situated purchasing carriers to provide the element at that rate.”¹⁴⁷ This only makes sense: by definition, these Section 271 rules would control only where the Commission has found no impairment, and that is why there is “no serious argument” that Section 271 elements should be regulated at below-market rates.¹⁴⁸

¹⁴⁴ *USTA II*, 359 F.3d 554, 576 (D.C. Cir. 2004); *UNE Remand Order* ¶ 473.

¹⁴⁵ *UNE Remand Order*, ¶ 473.

¹⁴⁶ *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 489 (2002).

¹⁴⁷ *TRO*, ¶ 664.

¹⁴⁸ *USTA II*, 359 F.3d at 576.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in AT&T's opening comments, the Commission should maintain its historic "light touch" approach to broadband and Internet-based services for business users.

Respectfully submitted,

/s/ Jack S. Zinman

David L. Lawson
James P. Young
Christopher T. Shenk
Sidley Austin LLP
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

Jack S. Zinman
Christopher M. Heimann
Gary L. Phillips
Paul K. Mancini
AT&T Inc.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-2053

November 4, 2010